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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE* 2
TO PRECLUDE ARGUMENT OR
EVIDENCE ON IMPLIED CONSENT**

The Honorable Yvonne Gonzalez Rogers
Date: November 29, 2023
Time: 9:00 a.m.
Location: Courtroom 1 – 4th Floor

Trial Date: January 29, 2024

1 **I. INTRODUCTION**

2 Plaintiffs’ Motion *in Limine* 2 To Preclude Argument or Evidence on Implied Consent
 3 (“Motion”) turns on a false premise—that the Court’s “decision not to certify a (b)(3) class
 4 effectively severs Google’s affirmative defense of implied consent from . . . trial.” Mot. 2. While
 5 that defense indeed presents individualized inquiries that preclude a classwide finding of liability
 6 or entitlement to damages, implied consent remains relevant to both the named Plaintiffs’
 7 individual claims and to the appropriateness of classwide injunctive relief. In seeking to exclude
 8 that issue, Plaintiffs effectively (and improperly) ask the Court to grant summary judgment on
 9 Google’s implied consent defense as to each named Plaintiff. Moreover, the evidence Plaintiffs
 10 seek to preclude is relevant to trial issues beyond implied consent, and on that independent basis
 11 should not be excluded. The Motion should be denied.

12 **II. ARGUMENT**

13 **A. Individual Plaintiffs’ Implied Consent Remains a Live Issue at Trial**

14 The Court denied Plaintiffs’ motion to certify a damages class under Rule 23(b)(3)
 15 because “determining whether class members impliedly consented to the alleged conduct . . .
 16 would require individualized assessment into class members’ experience” including what they
 17 “knew, read, saw, or encountered.” Dkt. 803 (“Class Cert. Ord.”) at 32. That is equally true for
 18 the named Plaintiffs as for any other class member.¹ *See id.* (“The Court expects that the parties
 19 will also litigate the issue [of implied consent] at trial.”). Simply stated, Google is entitled to
 20 pursue its implied consent defense when the named Plaintiffs present their cases, including by
 21 showing that each was exposed to sources of information that put them on “adequate notice” of
 22 Google’s data collection practices. Class Cert. Ord. 30–31. Those sources include Google Help
 23 Center articles, books, media reports, and Chrome’s own “tool that users can use to see, in real

24 _____
 25 ¹ Plaintiffs twist the Court’s words in asserting that the summary judgment order “found that
 26 only explicit, not implied, consent” remains at issue in the case. Mot. 2. What the Court held
 27 was that only explicit consent “is at issue *here*,” that is, in Google’s summary judgment motion.
 28 Dkt. 969 at 13 n.12. But that motion raised only arguments on which Google believed there was
 no material dispute of fact as to Plaintiffs and the class. A broader range of arguments are
 available at trial—where the jury will both resolve factual disputes and evaluate each named
 Plaintiff’s claims individually.

1 time, what data is being collected when users are browsing in private mode.” *Id.*

2 Plaintiffs assert that no named Plaintiff actually *was* exposed to the posts, reports, or
3 tools giving them notice of the challenged conduct, Mot. 2–3 & n.1, but those are *disputed*
4 *questions of fact*, not a basis to exclude evidence. The Court should not give Plaintiffs a free
5 pass by accepting their self-serving deposition testimony (which, at any rate, did not address
6 every source from which consent could be implied) rather than allowing the jury to test their
7 credibility. *See United States v. Leal-Del Carmen*, 697 F.3d 967, 972 (9th Cir. 2012) (“[T]he
8 weight and credibility of testimony is for the jury to determine.”). Indeed, Plaintiffs’ Motion
9 concedes at least one plaintiff “*was aware of*” Chrome’s tool that shows transmissions to Google
10 in real time, even if he now claims not to have “used it for that purpose.” Mot. 2 (emphasis
11 added).

12 **B. Implied Consent Is Relevant to Injunctive Relief**

13 The evidence Plaintiffs seek to exclude is also relevant to the appropriateness of
14 classwide injunctive relief. As Google explained in its opposition to Plaintiffs’ *Daubert* motion
15 to exclude the same surveys at issue here, evidence that millions of class members understood
16 and consented to the challenged conduct is highly relevant to whether any (and, if so, what)
17 injunction should issue.² Dkt. 1004-1 at 6–7. The same is true of Google Help Center articles
18 and media reports that put millions of readers on notice that Google receives data from private
19 browsing sessions.³

20 Plaintiffs’ contrary argument—that as long as “at least some” of the class was not aware
21 Google received all of the data at issue, “it is not relevant to Google’s liability for injunctive
22

23 ² Plaintiffs’ emphasis on Google’s statement that implied consent is not a defense “specific to
24 injunction,” Mot. 3, is misplaced. Implied consent is a defense to *liability*, which Plaintiffs admit
25 is a prerequisite to injunctive relief. Dkt. 932 (Plaintiffs’ Rule 23(c)(4) Reply) at 5 (“[T]o secure
26 injunctive relief, Plaintiffs will need to prevail on the disputed liability issues”); *see, e.g.,*
27 *Rockridge Tr. v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1167 (N.D. Cal. 2013) (“[A] cause
28 of action must exist before injunctive relief may be granted.”).

³ For instance, the class certification order recognized that users viewed a Google Help Center
article that might have put them on notice of the challenged collection around *30 million times*.
Class Cert. Ord. 31.

1 relief to the class as a whole whether others might have been,” Mot. 3—finds no support in the
 2 law (and Plaintiffs cite none). It also squarely contradicts binding Supreme Court and Ninth
 3 Circuit precedent.

4 First, evidence that a majority of class members impliedly consented to the challenged
 5 conduct is relevant to whether “a single injunction” would “provide relief to each member of the
 6 class,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011), such that injunctive relief is
 7 “appropriate respecting the class as a whole,” Fed. R. Civ. P. 23(b)(2). Second, that evidence
 8 bears on a key prerequisite to *any* permanent injunction: whether “considering the balance of
 9 hardships between the plaintiff[s] and defendant, a remedy in equity is warranted.” *Galvez v.*
 10 *Jaddou*, 52 F.4th 821, 831 (9th Cir. 2022). And third, the same evidence would inform the
 11 appropriate *scope* of any resulting injunction, which is “dictated by the extent of the violation
 12 established,” *Lewis v. Casey*, 518 U.S. 343, 360 (1996) (internal quotation marks omitted); *see*
 13 *also McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (“A district court abuses its
 14 discretion by issuing an ‘overbroad’ injunction.”). Plainly, evidence that Google is not liable to
 15 *more than half* of the class is material to an inquiry focused on “relief to each member of the
 16 class,” the “balance of hardships” and the “extent of the violation established.”

17 Plaintiffs cannot evade this blackletter law with a conclusory assertion about what
 18 millions of class members might want. *See* Mot. 3 (arguing “[a]nyone who may have
 19 hypothetically been aware of Google’s collection of private browsing information could not
 20 possibly object to an injunction requiring Google to disclose clearly and affirmatively what they
 21 purportedly already know, or to stop collecting that information.”). Class members who already
 22 understand Google’s disclosures may well object to complicating them with additional (and
 23 potentially more confusing) verbiage. And in any event, Plaintiffs seek far more than a change
 24 to Google’s disclosures, including an order “requir[ing] Google to *remove any services* that were
 25 developed or improved with [] private browsing information.” Class Cert. Ord. 33; *see*
 26 Pretrial Statement (claiming “changes to Google’s disclosures would [not] provide
 27 adequate relief to the classes” and insisting that Google be ordered to “delete *any* products,
 28 algorithms, or services built with *any* private browsing data”). Such a draconian injunction—

1 which could sweep in numerous popular products like Chrome, Maps, Ads, and Analytics—
 2 would negatively affect *hundreds of millions* of class members and non-class members alike.

3 **C. The Evidence Plaintiffs Seek To Exclude Is Relevant For Reasons Beyond Implied**
 4 **Consent**

5 Plaintiffs’ Motion should also be denied because the evidence at issue is also relevant to
 6 claims and defenses beyond implied consent. Professor Amir’s survey evidence is relevant to
 7 each of Plaintiffs’ causes of action, as Google has already explained. *See* Dkt. 1004-1 at 4–5.
 8 Disclosures by Google and other browser manufacturers, news articles, and even a book
 9 published by Plaintiffs’ own privacy expert, that describe the limitations of private browsing are
 10 similarly relevant. For instance, Google’s widely read Help Center articles bear on whether users
 11 reasonably expected their communications to be recorded under CIPA § 632, whether Google
 12 used data “without permission” under CDAFA, and whether Plaintiffs had “a reasonable
 13 expectation of privacy” or Google’s conduct was so “highly offensive” that it gives rise to
 14 constitutional or tort liability. Broad media coverage—including articles describing the *benefits*
 15 of Incognito mode⁴—is also relevant evidence that Google’s data collection practices are not the
 16 “egregious breach of social norms” necessary to establish liability under California law. *See Hill*
 17 *v. Nat’l Coll. Ath. Ass’n.*, 7 Cal. 4th 1, 37 (1994).

18 **III. CONCLUSION**

19 For the foregoing reasons, the Court should deny Plaintiffs’ motion to exclude evidence
 20 and argument regarding implied consent.

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 22
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 26 ⁴ *See, e.g.*, Pamela J. Hobart, Bustle, “These Are All Good Reasons To Use Incognito Mode,”
 27 (2016), *available at* <https://www.bustle.com/articles/184465-11-reasons-to-use-incognito-mode-when-browsing-the-internet-according-to-reddit>; Joe McGauley, Thrillist, “What Chrome’s
 28 Incognito Mode Is Actually For, Explained by a Google Exec,” (2017), *available at* <https://www.thrillist.com/entertainment/nation/what-is-incognito-mode-google-chrome>.

1 DATED: October 17, 2023

Respectfully submitted,

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